Supreme Court, U.S.
FILED
AUG 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-7272

In The
Supreme Court of the United States

October Term, 1990

RONALD HARMELIN,
Petitioner,

v.

STATE OF MICHIGAN,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF AMICUS CURIAE OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, IN SUPPORT OF THE RESPONDENT.

(List of Counsel on Inside Front Cover)

OF COUNSEL:
RICHARD P. IEYOUB, ESQ.
President,
National District Attorneys
Association,
District Attorney,
14th Judicial District
P.O. Box 3206
Lake Charles, Louisiana 70602

JACK E. YELVERTON, ESQ.
Executive Director,
National District Attorneys
Association,
1033 N. Fairfax Street
Suite 200
Alexandria, Virginia 22314

JAMES P. MANAK, ESQ.
421 Ridgewood Avenue
Glen Ellyn, Illinois 60137
Telephone: (708) 858-6397

Counsel of Record for
Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....ii

INTEREST OF AMICUS CURIAE.....2

ARGUMENT.....3

A MANDATORY SENTENCE OF LIFE IMPRISONMENT FOR CONVICTION OF POSSESSION OF MORE THAN 650 GRAMS OF COCAINE DOES NOT VIOLATE THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT.....3

CONCLUSION.....7

APPENDIX.....App-1

TABLE OF AUTHORITIES

Cases: **Page**

Mistretta v. United States,
___ U.S. ___, 109 S. Ct. 647 (1989).....4
People v. Harmelin,
176 Mich. App. 525, 440 N.W.2d 75 (Mich. App. 1989),
leave to appeal den., 434 Mich. 863 (1990).....3
Solem v. Helm,
463 U.S. 277, 103 S. Ct. 3001 (1983).....3,4,5
Terrabonne v. Butler, 848 F.2d 500 (5th Cir. 1988).....5
United States v. Brown,
859 F.2d 974 (D.C. Cir. 1988).....5
United States v. Cook,
859 F.2d 777 (9th Cir. 1988).....5
United States v. Murillo-Guzman,
845 F.2d 314 (11th Cir. 1988).....5
United States v. Zavala-Serra,
853 F.2d 1512 (9th Cir. 1988).....5
Young v. Miller, 883 F.2d 1276 (6th Cir. 1989).....4

Article:
Castine, "Drug Czar Says Law Fits the Crime," *The Free Press* (Detroit, MI, March 12, 1990 p. A4).....6

Appendix:
Life Imprisonment for Drug Offenses - A Selection of State Statutes.....App. 1

No. 89-7272

In The
Supreme Court of the United States
October Term, 1990

RONALD HARMELIN,
Petitioner,
v.

STATE OF MICHIGAN,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF AMICUS CURIAE OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, IN SUPPORT OF THE RESPONDENT.

This brief is filed pursuant to the Rules of the United States Supreme Court. Consent to file has been granted by Carla J. Johnson, Esq., Counsel for the Petitioner, and Hon. Richard Thompson, Prosecuting Attorney, Oakland County, Michigan, Counsel for Respondent. A Joint Consent of the parties has been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publications, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

In this case NDAA speaks as the representative of locally elected prosecuting attorneys in America. Our over 6,500 members are drawn from the body of elected and appointed prosecutors from every state in the United States. Among the programs operated by NDAA for local prosecutors is the National Drug Prosecution Center, Alexandria, Virginia, which seeks to improve the prosecution function in drug cases. The statute in question, and its application in this case, is viewed by the Nation's prosecutors as indispensable to the effective prosecution of drug traffickers.

ARGUMENT

A MANDATORY SENTENCE OF LIFE IMPRISONMENT FOR CONVICTION OF POSSESSION OF MORE THAN 650 GRAMS OF COCAINE DOES NOT VIOLATE THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT.

In this case the Michigan Court of Appeals held, *inter alia,* that a mandatory sentence of life imprisonment for a conviction of possession of more than 650 grams of cocaine did not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment. *People v. Harmelin,* 176 Mich. App. 525, 440 N.W.2d 75 (Mich. App. 1989), *leave to appeal den.,* 434 Mich. 863 (1990).

Amicus will not duplicate the case law analysis presented by the Respondent in this case, although we agree with it. Instead, we concentrate primarily on issues of policy that concern local prosecutors and we speak from a national perspective.

Although *amicus* believes that this Court's decision in *Solem v. Helm,* 463 U.S. 277, 103 S. Ct. 3001 (1983), as requiring a proportionality review for legislatively determined terms of imprisonment, was wrongly decided, it should be clear in this case that the sentence imposed does not offend the rule adopted in *Solem. Solem* identified three factors for reviewing courts to consider in passing on the proportionality issue in terms of the Eighth Amendment:

(1) The gravity of the offense and the harshness of the punishment;

(2) The sentences imposed on other defendants in the same jurisdiction; and

(3) The sentence imposed for commission of the same crime in other jurisdictions.

To begin with, this Court has made clear in *Mistretta v. United States,* ___ U.S. ___, 109 S. Ct. 647 (1989), that in non-capital cases a proportionality review need not focus on the particular offender (his background, criminal record, prospects for rehabilitation, etc.), but need only address the appropriateness of the legislative choice in establishing a penalty (and the fact that the choice has been made by the legislature, with reduced discretion in the judiciary, does not violate separation of powers principles). Even if the facts concerning the particular offender were relevant to a proportionality analysis in the instant case, however, the Petitioner would be an entirely appropriate subject for the sentence received. The record shows that he not only possessed over 650 grams of cocaine, but that some of it was packaged for resale, he possessed additional narcotics and paraphernalia, and had a beeper with coded instructions to service his narcotics clientele. He was, in short, the typical modern drug dealer, well-equipped to ply his trade. The collective experience of our membership with the havoc wreaked upon Society by drug traffickers argues against any contention that the sentence as imposed was inappropriate in a constitutional sense for this particular defendant.

We believe that the proportionality review required under *Solem* was effectively performed by the Sixth Circuit Court of Appeals in *Young v. Miller,* 883 F.2d 1276 (6th Cir. 1989), when it rejected a similar argument made by a defendant convicted under a similar statute for possession with intent to deliver 650 grams or more of heroin. Although the court in *Young v. Miller* considered the particular circumstances of the defendant in that case, its analysis of the three part *Solem* test as

applicable to the statute is correct. It concluded that "[h]aving analyzed Young's sentence under each of the *Solem* factors, we conclude that her sentence is not so grossly disproportionate to her crimes as to violate the Eighth Amendment." 883 F.2d at 1285.

Other courts have agreed that similar and related mandatory penalty statutes for drug possessors and traffickers were appropriate and constitutional legislative choices, and were properly applied to the defendants in those cases. *See, e.g., United States v. Brown,* 859 F.2d 974 (D.C. Cir. 1988); *United States v. Cook,* 859 F.2d 777 (9th Cir. 1988); *United States v. Zavala-Serra,* 853 F.2d 1512 (9th Cir. 1988); *United States v. Murillo-Guzman,* 845 F.2d 314 (11th Cir. 1988). Perhaps the matter was put best by the Fifth Circuit Court of Appeals in *Terrabonne v. Butler,* 848 F.2d 500 (5th Cir. 1988), when the court, in considering a similar statute, noted:

> Except in rare cases, the murderer's red hand falls on one victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner's evil image--others who create others still, across our land and down our generations, sparing not even the unborn.
> 848 F.2d at 504.

Amicus submits that the legislative choice made by the State of Michigan and applied in this case is not only constitutionally sound but good public policy as well. It is a choice geared to adequately meeting the narcotics trafficking problem of the 1990's, and a choice that prosecutors who are in the front lines of dealing with this problem support. Many states have adopted various forms of mandatory and discretionary life term penalties

for sale, trafficking, and possession of specified large quantities of narcotics. These statutes are collected in the Appendix to this brief. *Amicus curiae* expects that as the success of these statutes in effectively dealing with the narcotics problem becomes apparent, many more states will adopt similar statutes. We respectfully urge this Court to give a clear signal to the state legislatures that this needed response to the scourge of drug trafficking is constitutionally permissible.

For those who argue that a life sentence for possession of over 650 grams of cocaine is constitutionally disproportionate to the crime, we would answer that prosecutors are well aware of the significance of possession of that amount of narcotics and its devastating impact upon Society. As noted by Donald Reisig, Director, State of Michigan Office of Drug Agencies: "I think we have to articulate what 650 grams is. It's a pound and a half, roughly. That's not a small quantity. [...] It's not 20 tons in a warehouse. I understand that. But a pound and a half of cocaine can do immeasurable damage to a society." Castine, "Drug Czar Says Law Fits the Crime," *The Free Press* (Detroit, MI, March 12, 1990, p. A4).

As prosecutors with a national perspective, amicus curiae have seen the effects of similar large quantities of cocaine and related narcotics upon our communities, particularly our youth. We respectfully submit that the effect of such a quantity of narcotics is easily more devastating than a gun in the hand of a murderer. The legislative choice made by the State of Michigan, and its application in this case, does not offend the constitutional mandate of the Eighth Amendment.

CONCLUSION

Amicus curiae submits that the judgment of the court below should be affirmed on the basis of the law and sound judicial policy.

Respectfully submitted,

OF COUNSEL:

RICHARD P. IEYOUB, ESQ.
President,
National District Attorneys
Association,
District Attorney,
14th Judicial District
P.O. Box 3206
Lake Charles, Louisiana 70602

JAMES P. MANAK, ESQ.
421 Ridgewood Avenue
Glen Ellyn, Illinois 60137
Telephone: (708) 858-6392

Counsel of Record for Amicus Curiae

JACK E. YELVERTON, ESQ.
Executive Director,
National District Attorneys
Association,
1033 N. Fairfax Street
Suite 200
Alexandria, Virginia 22314

APPENDIX

Life Imprisonment for Drug Offenses --
A Selection of State Statutes.

The statutory authority for imposition of life sentences is not uncommon. For example, Alabama, Louisiana, Michigan, and Oklahoma impose mandatory life sentences for particular drug offenses. (See attached list A). Several other states give courts discretion to impose life sentences in specified related circumstances. (See attached list B).

A
Mandatory Life Imprisonment
for
Specified Drug Offenses

Alabama

Drug Offenses ALA. CODE 13A-12-201 to 13A-12-270 (Supp. 1989).

13A-12-231

(1)(d) "Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of" 1,000 pounds or more of cannabis "shall be sentenced to a mandatory term of imprisonment of life without parole."

(2)(d) "Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is in actual or constructive possession of" 10 kilos or more of "cocaine or of any mixture containing cocaine" [...] "shall be sentenced to a mandatory term of imprisonment of life without parole."

(3)(d) "Any person who knowingly sells, manufactures, delivers, or brings into this state,

or who is knowingly in actual or constructive possession of" 56 grams or more of "any morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin" [...] "shall be sentenced to a mandatory term of imprisonment of life without parole."

(4)(d) "Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of" 100,000 capsules or more of "methaqualone" [...] "shall be sentenced to a mandatory term of imprisonment of life without parole."

(5)(d) "Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of" 10,000 pills or capsules of hydromorphane "shall be sentenced to a mandatory term of imprisonment of life without parole."

(6)(d) "Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of" 10 kilos or more of "3,4 - methylenediaxy amphetamine or of any mixture containing 3,4 -methylenediaxy amphetamine" [...] "shall be sentenced to a mandatory term of imprisonment of life without parole."

(7)(d) "Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of" 10 kilos or more of "5-methaxy-3,4- methylenediaxy amphetamine or of any mixture containing 5-methaxy-3,4 methylene-

diaxy amphetamine" [...] "shall be sentenced to a mandatory term of imprisonment of life without parole."

(8)(d) "Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of" 56 grams or more of "phencyclidine or any mixture containing phencyclidine" [...] "shall be sentenced to a mandatory term of imprisonment of life without parole."

(9)(d) "Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of" 56 grams or more of "lysergic acid diethylamide or any mixture containing lysergic acid diethylamide" [...] "shall be sentenced to a mandatory term of imprisonment of life without parole."

Louisiana

Controlled Substances Act LA. REV. STAT. ANN. 40:961 to 40:995 (West 1977, Supp. 1990).

966

A. "Except as authorized by this part, it shall be unlawful for any person knowingly or intentionally:
(1) To produce, manufacture, distribute or dispense or possess with intent to produce, manufacture, distribute, or dispense, a controlled dangerous substance classified in Schedule I;
(2) To create, distribute, or possess with intent to distribute, a counterfeit controlled dangerous substance classified in Schedule I."

B. "Any person who violates Subsection A. with respect to:
(1) A substance classified in Schedule I which is a narcotic drug (all substances in Schedule I preceded by an asterisk) upon conviction shall be sentenced to life imprisonment at hard labor without benefit of probation, or suspension of sentence, and may, in addition, be required to pay a fine of not more than fifteen thousand dollars."

Michigan

Public Health Code. MICH. STAT. ANN. 14.15(7101) to 14.15(7545) (Callaghan Supp. 1987).

14.15(7401)(2)(a)(i)

(1) "Except as authorized by this article, a person shall not manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance, a prescription form, an official prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under this article shall not dispense, prescribe or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, license, or applicant."

(2) "A person who violates this section as to:
(a) a controlled substance classified in schedule 1 or 2 which is either a narcotic drug or described in section 7214(a)(iv) and:
(i) which is in an amount of 650 grams or more of any mixture containing that controlled substance is guilty of a felony and shall be imprisoned for life."

14.15(7403)

(1) "A person shall not knowingly or intentionally possess a controlled substance, or an official prescription form, or a prescription form unless the controlled substance, official prescription form, or prescription form was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article."

(2) "A person who violates this section as to:
(a) a controlled substance classified in schedule 1 or 2 which is either a narcotic drug or described in section 7214(a)(iv) and:
(i) which is in an amount of 650 grams or more of any mixture containing that controlled substance is guilty of a felony and shall be imprisoned for life."

Oklahoma

Uniform Controlled Dangerous Substances Act. OKLA STAT. tit. 3 [2-101 to 2-608] (West Supp. 1990).

2-415 (Trafficking in Illegal Drug Act)

C.3. "If the person has previously been convicted of two or more violations of this section or any provision of the Uniform Controlled Dangerous Substances Act which constitutes a felony, or a combination of such violations arising out of separate and distinct transactions, life without parole."

"The terms of imprisonment specified in this subsection shall not be subject to statutory provisions for suspension, deferral or probation, or state correctional institution earned credits

occurring from and after November 1, 1989, except for the achievement earned credits authorized by subsection F of Section 1.38 of Title 57 of the Oklahoma Statutes."

B
Possibility of Life Imprisonment
for
Specified Drug Offenses

The following state statutes permit judicial discretion for sentences up to life imprisonment for various acts of sale, trafficking, and possession of narcotics:

Arkansas

Controlled Substances. ARK. CODE ANN. 5-64-101 to 5-64-906 (1987).

Connecticut

Controlled Substances Act. CONN. GEN. STAT. ANN. 21a-240 to 21a-308 (West Supp. 1990).

Florida

Comprehensive Drug Abuse Prevention and Control Act. FLA. STAT. ANN. 893.01 to 893.20 (West Supp. 1990).

Idaho

Controlled Substances. IDAHO CODE 37-2701 to 37-2751 (Supp. 1989).

Montana

Dangerous Drugs. MONT. CODE ANN. 45-9-101 to 45-9-202 (1989).

New Hampshire

Controlled Drug Act. N.H. REV. STAT. ANN. 318-B:1

to 318-B:30 (Supp. 1989).

New Jersey

Controlled Dangerous Substances. N.J. STAT. ANN. 2C:35-1 to 2C:35-23 (West Supp. 1989).

Nevada

Uniform Controlled Substance Act. NEV. REV. STAT. ANN. 453.011 to 453.348 (1986).

Rhode Island

Controlled Substances Act. R.I. GEN. LAWS 21-28-1.01 to 21-28-6.02 (1989).

Texas

Controlled Substances Act. Tex. Health and Safety Code Ann. 481.001 - 481.205 (1990).